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No. 85-260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MANHATTAN INDUSTRIES, INC.,
Petitioner,

v.

LAWRENCE GOLDSTEIN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Must a terminated employee prove, in order to establish a **prima facie** case under the Age Discrimination in Employment Act, 29 U.S.C. § 621 **et seq.**, that he was replaced by a person younger than 40 years of age?

2.

Where a jury finds both that an employee's right to sell non-competing "outside lines" was a benefit of his employment with his primary employer and also that lost income from those outside lines was caused by that employer's discriminatory discharge of the employee, does the petition present any substantial issue warranting review?

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STATEMENT OF THE CASE

In March, 1960, Respondent Lawrence Goldstein (''Goldstein'') became employed by Petitioner Manhattan Industries, Inc. '(''Manhattan'') as a sales representative in its Lady Manhattan division. Goldstein, who was 38 years old at the time, served as an exclusive Manhattan representative in Alabama, Georgia and the Florida panhandle, until he was terminated in 1982, at age 60.

In 1979, Manhattan reorganized its marketing program and converted the major department stores in each sales territory to "house accounts," serviced directly from the New York office. Goldstein's major store accounts, the Rich's and Davison's stores in Atlanta, had produced a substantial portion of his income. To offset this loss, Manhattan allowed Goldstein to begin selling non-competing apparel lines along with his Manhattan products. Goldstein used Manhattan as his "headliner" and regularly advertised in trade papers the fact that both his Manhattan goods and his so-called "outside lines" would be shown in the Manhattan showroom in the Atlanta Apparel Mart and elsewhere.

Despite Manhattan's increasingly poor product line, in both 1980 and 1981 Goldstein's sales of Lady Manhattan products were among the highest in the company. Using his "headliner" and the desirable location of the Manhattan showroom in the Atlanta Apparel Mart, Goldstein successfully attracted customers for all of his merchandise, and sales from his outside lines increased to replace the income he lost when the Rich's and Davison's accounts were taken from him.

In early 1982, two substantially younger men, Bob Guberman, age 41, and Preston Imber, age 39, took over management of the Lady Manhattan division, and decided that sales representatives would be required to return to their former exclusive basis. Goldstein, then age 60, was targeted as one of the first six sales representatives who would be required to abandon their outside lines. One of Guberman's first steps was to begin to interview applicants for positions as sales representative in the Southeast, and on March 4, he went to Atlanta to interview Michael Eiseman, who was 14 years

younger than Goldstein, for such a position. Eiseman had previously met with Guberman in New York in February. Guberman telephoned Eiseman at 11:00 p.m., asked him to come to an interview at 11:30 p.m. at Guberman's hotel, and hired him shortly thereafter to take over Goldstein's territory.

Around 8:30 that same evening, Guberman telephoned Goldstein in Birmingham and broke the news to him that Manhattan expected him to give up his outside lines and return to an exclusive basis. According to Goldstein, Guberman said nothing about restoring to him the Rich's and Davison's accounts. Goldstein protested that it was unfair to ask him to give up his outside lines without restoring to him the Rich's and Davison's accounts, and offered a counter-proposal, whereby his nephew would assume primary responsibility for the outside lines, while he continued to concentrate on Manhattan. Guberman rejected the counter-proposal in a letter reiterating his insistence that Goldstein abandon his outside lines, but which said nothing about returning Goldstein's major store accounts. Guberman's handwritten draft of the same letter assigned Goldstein a sales target: "Your present target for the fall 82 season is $350,000. Excluding Richs & Davidsons." This draft also referred to substandard sales performance, a subject not mentioned in either the March 11 letter, or in a typed draft of the same letter dated March 10. Goldstein's name was omitted from an official sales brochure mailed out on March 9 and 10.

Guberman wrote Goldstein another letter, dated March 12 but not mailed until March 15, advising that Goldstein's employment would be terminated effective March 15. Of course, Guberman had already hired

Eiseman to replace Goldstein under the same exclusive arrangement as had been required of Goldstein, but Eiseman was given the Rich's and Davison's accounts.

Goldstein did not receive the March 15 termination letter before he traveled to New York for a Manhattan sales meeting. While in New York, Goldstein learned that other salesmen who had been required to return to exclusivity also had regained their major store accounts. At the conclusion of the sales meeting, Goldstein met with Guberman and Imber and confronted them with not being given the same consideration as other salesmen. Guberman became angry, accused Goldstein of never intending to accept the job, and terminated Goldstein's employment. When Goldstein returned to Birmingham, Guberman's March 12 letter of termination was waiting for him.

At trial, Goldstein offered the expert testimony of a labor economist, in addition to his own testimony, to establish that although he continued to sell his "outside lines" after his termination, his loss of the Manhattan line adversely affected his ability to sell the other products. For example, instead of showing his goods in Manhattan's desirable location in the Apparel Mart, Goldstein was relegated to a temporary booth on the lower level of the building, where even his regular customers had difficulty finding him. The loss of his headliner also eliminated his entree which aided him in successfully marketing his noncompeting lines. The labor economist conservatively estimated Goldstein's net loss earnings from both Manhattan (assuming the exclusion of Rich's and Davison's) and his outside lines.

The jury returned a verdict in Goldstein's favor, awarding him lost wages and benefits, and also found that Manhattan's violation of the ADEA was willful. The trial judge thereafter awarded Goldstein damages in an amount equal to back pay and benefits and entered a judgement against Manhattan.

REASONS FOR DENYING THE WRIT

Manhattan suggests that its petition "presents to this Court for the first time two issues of special importance." To the contrary, the petition presents no substantial question arising under the Age Discrimination in Employment Act, 29 U.S.C. § 621, **et seq.** ("ADEA") warranting review by this Court. At most, Manhattan merely rehashes a jury's award of lost wages which was based on substantial, if not uncontroverted evidence.

I. Neither this Court Nor Any Court of Appeals Has Required That a Plaintiff May Recover in an Action Under the ADEA Only if He Proves That He Was Replaced By a Person Younger Than 40 Years of Age.

Manhattan seeks review in this case to establish a proposition of law contrary to the authorities of this Court and rejected unanimously by every Court of Appeals which has considered the issue. Manhattan nonetheless urges that in an action under the ADEA, a Plaintiff may prevail only upon proof that he was replaced by a person younger than 40 years old.

A plaintiff's initial burden in an action under the ADEA is to present evidence sufficient "to create an

inference that an employment decision was based on a discriminatory criterion illegal under the Act." **International Brotherhood of Teamsters v. United States,** 431 U.S. 324, 358 (1977) (construing Title VII of the Civil Rights Act of 1964, 42 U.S. C. § 2000e, **et seq.**). A plaintiff may satisfy that burden by either direct or circumstantial evidence, but because direct evidence of an employer's discriminatory motive is often difficult to obtain, a plaintiff will often rely on the guidelines established in **McDonnell Douglas Corp. v. Green,** 411 U.S. 792 (1973), a Title VII case often adapted for use in ADEA actions. **See, Pace v. Southern Railway System,** 701 F. 2d 1383, 1386 (11th Cir.) **cert. denied,** _____ U.S. _____, 104 S. Ct. 549 (1983); **Elliott v. Group Medical & Surgical Service,** 714 F. 2d 556, 565, n. 11 (5th Cir. 1983), **cert. denied,** _____ U.S. _____, 104 S. Ct. 2658 (1984); **Smithers v. Bailar,** 629 F. 2d 892, 894 (3d Cir. 1980); **Price v. Maryland Casualty Co.,** 561 F. 2d 609, 612 (5th Cir. 1977).

Contrary to Manhattan's position, the **McDonnell Douglas** test, as originally articulated, did not include proof that a person outside the protected class was favored over the plaintiff; this Court allowed a plaintiff to prove a **prima facie** case of racial discrimination by showing:

> (i) that he belongs to a racial minority; (ii) that he applied for and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802. In a footnote, this Court explained what has since been accepted universally as a correct statement of the law in both Title VII and ADEA cases, that

> The facts necessarily will vary in Title VII cases and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.

Id. n. 13. This Court subsequently made it clear that **McDonnell Douglas** was not intended to be "rigid, mechanized, or ritualistic." **Furnco Construction Corp. v. Waters,** 438 U.S. 567, 577 (1978). Very recently, in **Cooper v. Federal Reserve Bank of Richmond,** _____ U.S. _____, 104 S. Ct. 2794, 2799 (1984), this Court again enumerated the elements of a **prima facie** case under **McDonnell Douglas** and did not include a requirement that a plaintiff prove replacement by a person outside the protected class.

Especially in ADEA cases, the Courts of Appeal have warned against strict application of the **McDonnell Douglas** guidelines. **E.g.,** the former Fifth Circuit's admonition in **Marshall v. Goodyear Tire & Rubber Co.,** 554 F. 2d 730, 745 (5th Cir., 1977) that **McDonnell Douglas** "does not establish an immutable definition of a **prima facie** case." **See, also, McCorstin v. United States Steel Corp.,** 621 F. 2d 749, 753 (5th Cir. 1980) ("not the alpha and omega of possible tests in the age discrimination context"); **DeHues v. Western Electric Co., Inc.,** 710 F. 2d 1344, 1347 (8th Cir. 1983).

Every Court of Appeals which has addressed this issue has permitted an ADEA plaintiff to prove a **prima facie** case by offering evidence that the favored person

was younger than the plaintiff. In **Loeb v. Textron, Inc.**, 600 F. 2d 1003, 1013 (1st Cir. 1979), the First Circuit reversed a jury charge requiring the plaintiff to prove that he was replaced by a person outside the protected age group, pointing out that **McDonnell Douglas** itself contained no such requirement. And in **Elliott v. Group Medical & Surgical Services, supra,** at 562, the Fifth Circuit held that the fourth prong of the **McDonnell Douglas** test could be satisfied by proof that the plaintiff was replaced either by a person outside the protected class, or merely by someone younger than plaintiff. Other circuits are in accord. **Haskell v. Kaman Corp.**, 743 F. 2d 113, 119 n. 1 (2d Cir. 1984) (characterizing the **McDonnell Douglas** test as requiring proof of favored treatment of a younger person rather than a person younger than 40); **Cuddy v. Carmen,** 694 F. 2d 853, 857 (D.C. Cir. 1982) (same); **Ackerman v. Diamond Shamrock Corp.**, 670 F. 2d 66, 69 (6th Cir. 1982) (same); **Maxfield v. Sinclair International,** 766 F. 2d 788, 793 (3rd Cir. 1985) (rejecting notion that any court ever held that replacement by a person under 40 was required under the ADEA); **Douglas v. Anderson,** 656 F. 2d 528 (9th Cir. 1981) (replacement by a slightly younger employee and evidence of substantially equal or superior qualifications satisfies **McDonnell Douglas**).

The decision of the Court of Appeals for the Eleventh Circuit thus in no way conflicts with applicable decisions by this Court or by any other Court of Appeals on the same matter.

II. The Jury's Award of Lost Wages and Benefits Was Supported by Substantial Evidence, Was Limited to the Facts of the Case, and Presents No Significant Issue for Review By the Court.

Manhattan's argument Goldstein is not entitled to recover monetary losses from his "outside lines" presents no significant question of policy or precedent and reflects only Manhattan's subjective disagreement with the jury's verdict in this case.

The trial judge instructed the jury that it should decide both the factual issue whether Goldstein's income from outside lines was a job-related benefit of his employment with Manhattan and the causal issue whether Goldstein suffered any loss therefrom, as well as the amount of loss, if any. Consistent with those instructions, the jury returned an interrogatory verdict finding that Goldstein's right to carry "outside lines" was a benefit of his employment and awarding Goldstein "lost wages and benefits," which included losses on those outside lines.

Manhattan does not contend that job-related benefits are never recoverable under the ADEA. Rather, its petition complains merely that the jury's reasoning was skewed and that it should have returned a verdict for Manhattan rather than awarding Goldstein anything, much less any lost income from his outside lines. Thus, Manhattan falls far short of its burden under Rule 19 to show that special and important reasons exist for granting the writ of certiorari.

As the Court of Appeals recognized below, Congress' clear intention that ADEA plaintiffs recover all lost wages and benefits caused by an employer's age discrimination is reinforced by the House Conference Report on the 1978 amendments to the ADEA. That report confirms that the term "amounts owing" under 29 U.S.C. § 626(b) "includes items of pecuniary or economic loss such as wages, fringes, **and other job related benefits.**" H.R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 13, **reprinted in** 1978 U.S. Cong. Code & Ad. News 504, 528, 535. (Emphasis supplied).

The Eleventh Circuit also relied on its decision in **Walker v. Ford Motor Co.**, 684 F. 2d 1355, 1364 (11th Cir. 1982), another Title VII case, which holds that a plaintiff may recover lost job benefits which constitute "concomitants of employment." Consistent with this result are two ADEA cases, **Kelly v. American Standard, Inc.**, 640 F. 2d 974, 985-86 (9th Cir. 1981), affirming the award of start-up costs of a new business venture following the discriminatory discharge of a sales representative, and **Blim v. Western Electric Co.**, 731 F. 2d 1473, 1480 (10th Cir. 1984), awarding plaintiff losses in Social Security benefits resulting from his discriminatory termination.

Here, Goldstein presented substantial evidence from which the jury was entitled to conclude both that his right to sell non-competing outside lines in addition to the Manhattan line was a fringe benefit or concomitant of his employment by Manhattan, and that economic loss resulted from Manhattan's discriminatory termination of that benefit. As to the amount of loss, Goldstein presented uncontradicted expert testimony which projected his anticipated earnings from his outside lines, and upon which the jury could base its verdict.

Factual determinations in ADEA cases must be treated no differently from any other findings by the trier of fact. **EEOC v. Wyoming Retirement System,** 771 F. 2d 1425, 1429 (10th Cir. 1985). Such findings cannot be reversed unless clearly erroneous. **Anderson v. City of Bessemer City, N.C.,** _____ U.S. _____, 105 S. Ct. 1504, 1511 (1985); **United States v. United States Gypsum Co.,** 333 U.S. 364, 395 (1948). Of course, where a jury is the trier of fact, the presumption in favor of the correctness of the result is even stronger. As this Court recently stated: "A reviewing court must begin with the reality that the jurors sat in the same room day after day with the [parties] . . . and their lawyers . . ." **United States v. Hastings,** _____ U.S. _____ 103 S. Ct. 1974, 1981 (1983).

CONCLUSION

Because the petition utterly fails to establish either the existence of any important question of federal law to be decided by this Court or that the decision of the Court of Appeals below conflicts in any way with any decision of this Court or another Court of Appeals, the petition should be denied.

Respectfully submitted,

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